United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

ORIGINAL

76-4249

76/4043/4009

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION,
Petitioner,

v.

JOHN SCAFFIDI,
Respondent.

CIVIL ACTION
No. 76-4043

RALPH CAPUTO,
Claimant,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPT. OF LABOR,
Respondents,

v.

NORTHEAST MARINE TERMINAL CO., INC., Employer,

and

STATE INSURANCE FUND, Carrier,
Petitioners,

CIVIL ACTION
No. 76-4009

(Other Captions Continued on Inside Cover)

BRIEF AMICUS CURIAE OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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ANTHONY DELLAVENTURA,
Claimant-Respondent,

CIVIL ACTION
No. 76-4042

v.

PITTSTON STEVEDORING CORP.

and

THE HOME INSURANCE COMPANY,
Employer/Carrier-Petitioners,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPT. OF LABOR,
Party in Interest.

CARMELO BLUNDO,
Claimant-Respondent,

CIVIL ACTION
No. 75-4249

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Self-Insured Employer-Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPT. OF LABOR,
Respondent.

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BRIEF AMICUS CURIAE
OF
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

INTRODUCTION

In 1972 the Longshoremen's and Harbor Workers' Act was amended. At the time longshoremen who were injured as a result of the unseaworthiness of an appurtenance of a ship had a right of action against the ship. The ships, in turn, by contract imposed third party liability against stevedores. The amendment protected the stevedores from liability. However, it imposed upon stevedores the duty of

uniform and substantial compensation coverage. In the instant cases and others throughout the country, longshore employers and their insurance carriers are seeking to limit the scope of this compensation coverage. The amendments were what Congress considered a reasonable balance. This should not be upset by the courts.

As Amicus, the International Longshoremen's Association, AFL-CIO (ILA), will rely upon the facts submitted by Claimants.

ARGUMENT

POINT I

The Longshoremen and Harbor Workers' Act was amended in 1972 to cover "any longshoreman" injured in "any . . . terminal." Claimants are longshoremen.

a. The Statutory language is clear and explicit.

Nothing in the language of the Longshoremen and Harbor Workers' Act 33 U.S.C. § 901 et seq. gives any basis for the distinctions that Petitioners herein seek to make. The plain meaning of the statute is that "any longshoreman" is a "person engaged in maritime employment." The status of a longshoreman is not affected by the function he happens to perform at the time he is injured. Under the words of the statute the only time the function comes into play is when the person injured is an "other person" i.e., not a longshoreman.

The argument of Petitioners is predicated upon an interpretation of the statute that would require elimination of the words parenthesized below:

> "The term 'employee' means any person engaged in maritime employment, including any (longshoreman or other) person engaged in longshoring operations . . . ." 33 U.S.C. §902(3)

Such an interpretation would be an amendment excluding from coverage a class of persons specifically included in the Act.

The Act does not define longshoremen. However, in this statute, the only way a "longshoreman" can not be defined is in terms of the work he is doing at the time he is

injured. This would create a circularity negating the words of the statute.

If a longshoreman (or other member of a class of covered employees) is injured while loading cargo on a ship, loading cargo on a truck or taking a coffee break, he is "engaged in maritime employment." Coverage may only be denied if the injury did not occur upon the navigable waters of the United States as defined by the Act.

When there is ambiguity in statutory language, lawyers and courts perform a service by interpreting and applying the language to facts. However, what Petitioners seek in this case and similar cases throughout the country is a distortion of language to meet their own ends. This Court must reject these efforts as classic pettifoggery. While language is flexible, words should not be perverted to the extent that they only mean what the speaker wants them to mean. "Any longshoreman" means "any longshoreman."

b. Claimants are longshoremen.

The office of Administrative Law Judge and Benefits Review Board were designated by Congress to decide the facts of cases coming under the Longshore and Harbor Workers Act. The qualifications of the people selected to fill these positions include expertise in the industries involved. They have determined that the Claimants were longshoremen. It is not for this court to contradict them.

The statute requires this court to presume:

> "that the claim comes within the provisions of this Act,"

unless there is substantial evidence to the contrary. 33 U.S.C. §920(a).

Since there is no evidence in any of the records below that these Claimants do not have the status of longshoremen this presumption is binding on the court. Even if there were such evidence the court is bound to defer to the opinion of the Administrative agency experts on the way the word is used in the industry.

Section 902 of the Act has 21 definitions but the word longshoreman as used in the Act is no so ambiguous as to require definition. In another context, however, Congress has accepted the definition of "Longshoreman" enacted by the State of New York and New Jersey in establishing the bi-state Waterfront Commission. Both the Petitioners and Claimants in this case are licensed by that agency. There can be no more definitive description of a person's professional status than that conferred by a license. 1/

1/ The definitions in the Bi-State Compact are found at §9806 of McKinney's New York Statutes and §32:23-6 of N.J.S.A. Congress consented to the Waterfront Commission Compact between New York and New Jersey, by Act of Aug. 12, 1953 c 407, 67 Stat. 541.

Definitions

"Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or
(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores, ...

. . .

"Pier" shall include any wharf, pier, dock or quay.

In addition to being licensed as longshoremen, the Claimants belong to a unit certified by the National Labor Relations Board as representing longshoremen. Matter of New York Shipping Association, 116 NLRB 428, 1188 (1966). This is the unit with which the Petitioners themselves have a contract.

This Court may look beyond the administrative definition. It may look to the labor relations of the parties themselves to determine the status of the Claimant as a longshoreman. In determining that a "pondman" is not a "longshoreman," the Court stated:

> "The Claimant's Membership is a non-maritime union rather than a maritime union speaks loudly for a joint labor-management practical and realistic construction of a pondman's work and duties as non-maritime employment." Weyerhauser Co. v. Gilmore, 528 F.2d 957, 962 (9th Cir. 1975).

In the instant case the practical and realistic construction of the parties has always been that the Claimants are longshoremen.

All Claimants are covered by the same contract which actually predicates an employee benefit upon "compensation

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1/ (cont.)

. . .

> "Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part.

. . .

> "Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

awards."[2/] Petitioners are, in effect, saying that men in the same longshore bargaining unit, included in the same seniority system, subject to the same longshore contract, paid the same longshore wages, covered by the same longshore pension and welfare plans are different in one respect. They have different compesnation plans.

Petitioners would have this court rule that some of these longshoremen, if they are injured in the course of their employment, suddenly, and for only one purpose, cease to be longshoremen. Do the Petitioners continue to be terminal operators during the period that the Claimants aren't longshoremen? Of course they do, and their longshore employees continue to be longshoremen, even if they get hurt.

While not controlling, the legislative history does illuminate the congressional intent that all members of the International Longshoremen's Association are longshoremen.

Senator Williams' speech states:

> "This bill is endorsed by the AFL-CIO, the International Longshoremen's Association - whose 115,000 membership is covered by the Act - ..." Congressional Record, Senate October 14, 1972.

2/

"GAI eligible employees, unable to work, and actually receiving compensation awards for occupational injuries suffered in this industry shall receive a benefit from the GAI Fund of not more than an amount equal to their compesnation payment for the first year of their injury up to a maximum, from all NYSA sources, including compensation, of 40 times the GAI hourly rate per week." Article 16, attachment "A" of Collective Bargaining Agreement between Petitioners and Claimants' Union, ILA. (It is significant that these matching payments come from the GAI Fund. Contributions to this Fund are made by steamship companies on the basis of an assessment imposed upon each ton of cargo shipped. In other words, during the very period that Petitioners contend that Claimants are not engaged in maritime employment part of the income they may be receiving is being paid by steamship companies.)

The legislative history also shows that the Act sought to achieve uniform coverage of all longshoremen. After describing the disparity (and inadequacy) of various State Workmen's Compensation Law, Senator Williams says:

> "Compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water." ibid.

The same language also appears in the House Committee Report 92-1441, 92d Cong.,2d Sess.at p. 10.

In his learned dissent in ITO v. Adkins, (Slip opinion p. 27, 4th Circuit, decided December 22, 1975, Motion for Rehearing en banc granted March 15, 1976). Circuit Judge Craven stated that the Claimants in that case would "be surprised to learn that they are not longshoremen and astonished to discover that they are not engaged in maritime employment of any kind." So would the Claimants herein.

POINT II

Each Claimant was "engaged in longshoring operations" at the time of his injury.

Petitioners' main contention is that the work the Claimants were doing when they were injured is not maritime employment or longshoring operations. They then seek a precise point between the ship and the consignee at which the cargo loses its maritime character. It should be noted that Petitioners have not always insisted upon such fine distinctions. On other occasions they have maintained that all work their employees do on the piers, docks and terminals is longshore work.

For example, Petitioners, through their multi-employer association, are currently before this Court in ILA and NYSA v. NLRB Case No. 75-4266. There, in a Statement of Facts, they report that:

> "[t]he traditional work of ILA longshoremen on the piers and docks is not limited to loading and unloading ships. It never has been. The ILA's work jurisdiction extends beyond the vessel. Thousands of longshoremen are employed on pier terminals, in addition to ship gangs. In fact, some 2,500 longshoremen were employed, before the Board's decision, in stuffing and stripping containers of local LTL and consolidated cargo. Historically, the ILA's exclusive, all-encompassing jurisdiction has enveloped all stevedoring activities at the extensive waterfront terminals in the Port of Greater New York.

> "The ILA longshoremen's handling of cargo for ocean shipment involved not only the stowage and discharge of cargo to and from the vessel. It also deals with all of the interrelated terminal functions in the movement of cargo across the piers from the tailgate of the delivery truck to the hold of the vessel for outbound cargo and the converse for inbound cargo. Such ILA work includes receipt, storage, sorting, checking, palletizing, cargo repair, carpentry, maintenance and delivery." P. 10, Brief of Petitioner NYSA (Appendix references omitted) (Emphasis supplied)

The longshore work described above includes what the Claimants herein were doing when they were injured.

In an earlier case, Intercontinental Container Transport Corporation v. NYSA, 426 F. 2d 884 (2d Cir. 1970), this Court accepted the description of longshoring operations propounded by NYSA (and ILA). At page 886 the Court said:

> "Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets sorting the cargo according to the consignees and delivering it to the trucks or other carriers." (Emphasis supplied)

It ill behooves Petitioners to come before the Court and now contend the work is not maritime employment.

In two of the cases, Dellaventura and Caputo, the claim is made that the cargo lost its maritime character because of the fortuitous circumstance that the consignee delayed in picking it up. The Act says nothing about the character of the cargo.

Imagine the confusion that would arise if the injury resulted from cargo falling off a pile next to the one on which the Claimants were working? Would coverage depend on how long both or either pile had been at the pier? Should a longshoreman, in order to protect his coverage under the Act, require his employer to post signs as to which cargo is still in maritime trade and which is not? These questions are no more absured than Petitioners distinctions.

The other two Claimants, Blundo and Scaffidi, were working with containerized rather than break-bulk cargo. Containerization is a technique for transporting cargo that revolutionized the shipping industry. It has reduced a ship's turnaround time from 8 days to 36 hours. In order to accomplish this feat the ships themselves were redesigned to accommodate 8' X 8' X 40' metal containers.

The cargo is no longer put directly in the ship's hold. There is no hold. Each container is a module. Together they function as a ship's hold. Leather's Best v. SS Mormalynx, 451 F. 2d 800, 815 (2d Cir. 1971). The cargo-handling aspects of longshore work are performed in relation to these parts of the ship rather than the entire ship. Modernization of the operations, whether through new equipment or novel

divisions of labor does not, in any way change its maritime character. See e.g. Huff v. Matson Navigation Co. 338 F. 2d 205 (9th Cir. 1964) at 212-213, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) Spann v. Lauritzen, 344 F. 2d 204 (1965).

The 1972 amendment of the Act was, in part, a response to the changes in longshore operations that resulted from containerization. The House Committee Report No. 92-1441 notes that:

> "with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than heretofore." (At p. 10, 3 U. S. Code, Congressional and Administrative News, 92 Congress 2nd session 4707-4708).

This is necessary because there is no longer room alongside the ship for the cargo. Huge cranes now occupy this space. They lift the containers from the rest of the vessel and place them on chassis. Motorized "hustlers" then move the containers to locations at the pier where longshoremen unload and sort the cargo, check it against manifests and bills of lading and assemble it to await pick-up by consignee's truckers.

This is how longshore operations are now performed. Parts of the ship, owned by the steamship companies, are moved to more productive locations. In the cases of Blundo and Scaffidi they were apparently moved over public roads but back to *situs* covered by the Act. This is a distinction without a difference. The fact of moving them to and from a maritime terminal over the road does not change the work of unloading them at a terminal to something other than a longshoring operation. Even if it did, unloading a part of a ship would still be maritime employment.

CONCLUSION

The decision and order of the Benefits Review Board should be affirmed.

Dated: April 30, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION,

Petitioner,

v.

JOHN SCAFFIDI,

Respondent,

(And Others)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York, New York

That on April 30, 1976, he served 2 copies of Brief and 1 copy of Motion of ISA,AFL-CIO for Leave to File Brief Amicas Curiae and to Participate in Oral Argument on

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by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan Delgado

Sworn to before me this
30th day of April, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION,

Petitioner,

v.

JOHN SCAFFIDI,

Respondent.

(And Others)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 E. 17th Street, Brooklyn, New York, 11230
That on April 30, 1976, she served 2 copies of Brief and 1 copy of Motion of ILA,AFL-CIO FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND TO PARTICIPATE IN ORAL ARGUMENT on

Ms. Laurie M. Streeter
Associate Solicitor
U. S. Department of Labor
Suite N-2716
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Washington, D. C. 20210

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
30th day of April, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
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